U.S. Department of Labor

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Issue Date: 10 August 2005

Case No.: 2004-LHC-1660

OWCP No.: 06-181463

IN THE MATTER OF

LARRY D. VAUGHN,
Claimant

vs.

LABOR FINDERS,
Employer

and

LEGION INSURANCE COMPANY,
Carrier

APPEARANCES:

RICHARD L. THIRY, ESQ.,
On Behalf of the Claimant

DOUGLAS L. BROWN, ESQ.,
On Behalf of the Employer/Carrier

BEFORE: RICHARD D. MILLS
Administrative Law Judge

DECISION AND ORDER

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 et seq., (the "Act" or "LHWCA"). The claim is brought by Larry D. Vaughn, "Claimant," against Labor Finders, "Employer," and Alabama Insurance Guaranty Assn., Successor to Legion

Insurance Company "Carrier." Claimant sustained a back injury on December 15, 1999 during his employment with Labor Finders. A hearing was held on March 17, 2005 in Mobile, Alabama, at which time the parties were given the opportunity to offer testimony, documentary evidence, and to make oral argument. The following exhibits were received into evidence:

1) Joint Exhibit No. 1; and

2) Respondent's Exhibits Nos. 1-10; and

3) Claimant's Exhibits Nos. 1-16.

Upon conclusion of the hearing, the record remained open for the submission of post-hearing briefs, which were timely received by both parties. This decision is being rendered after giving full consideration to the entire record.[1]

STIPULATIONS[2]

The Court finds sufficient evidence to support the following stipulations:

1) Jurisdiction is not a contested issue. Claimant was working in a crew that was loading wood chips aboard a vessel at the time of his December 15, 1999 work injury.

2) The date of Claimant's injury/accident was December 15, 1999.

3) Claimant's injury was in the course and scope of employment.

4) An employer/employee relationship existed at the time of the accident.

5) Employer was advised of the injury on December 15, 1999.

6) Employer filed a Notice of Controversion on December 20, 2000.

7) Informal Conferences were held on April 3, 2003 and March 9, 2004.

8) Claimant's average weekly wage at the time of injury was $406.93.

[1] The following abbreviations will be used in citations to the record: JX - Joint Exhibit, CX – Claimant's Exhibit, RX – Employer's Exhibit, and TR – Transcript of the Proceedings.
[2] JX-1.

9) Temporary total disability was paid from December 18, 1999 through November 24, 2000, for forty-nine weeks, at a rate of $271.29 per week, for a total of $13,293.21.

10) Medical benefits were paid.

11) Claimant has a permanent disability. Percentage is disputed.

ISSUES

The unresolved issues in these proceedings are:

(1) Relationship of Claimant's hip condition to the December 15, 1999 work injury;

(2) Nature and extent of disability related to the December 15, 1999 work injury; and

(3) Attorney's Fees, Penalties, and Interest.

SUMMARY OF THE EVIDENCE

I. TESTIMONY

Larry Vaughn

Larry Vaughn's deposition was taken on February 6, 2002. RX-9. Mr. Vaughn passed away on September 8, 2004 due to a cause unrelated to the present claim. CX-13. Thus, Mr. Vaughn did not testify at the formal hearing. Mr. Vaughn was approximately fifty years old at the time of his deposition. RX-9, p. 10. He possessed an eleventh grade education and his work history included employment as a form carpenter and equipment operator. He was able to operate bulldozers, front-end loaders, forklifts and backhoes. RX-9, p. 14-15.

At the time of his injury, Mr. Vaughn was employed through Labor Finders and had a job at Mobile Wood Chip in Mobile County, Alabama. His responsibilities included operating a bulldozer inside of a vessel to off-load wood chips that entered the vessel from a conveyer belt. RX-9, p. 16. On the date of the accident, he was called off board the ship to remove wood chips that had covered the motor of the conveyer belt. To do so, it was necessary to remove a cage that covered the motor. When the last bolt was removed, the cage catapulted Mr. Vaughn against a steel beam. He testified that he hit his back, from his left shoulder blade to his low back, against a steel beam and fell to the concrete on his rear. RX-9, p. 17-18. He testified that the impact knocked the breath out

of him. Other workers were present who helped him after the fall. RX-9, p. 19. Mr. Vaughn testified that he finished his shift that day. RX-9, p. 20. He also reported to work for the night shift the following day. He testified that he was sore, but did not seek medical treatment until the following day. RX-9, p. 22.

Mr. Vaughn was initially treated by Dr. Becker and was referred to Dr. Volkman. Dr. Volkman referred him to a neurosurgeon, Dr. Quindlen. RX-9, p. 23. Mr. Vaughn testified that at the time of his injury, he resided in Mobile County, Alabama. In the summer of 2001, he moved to Winfield, Alabama to care for his father. RX-9, p. 11. He returned to Mobile for approximately six months. He then returned to Winfield in the fall of 2001. RX-9, p. 12. He returned to Mobile again in February 2002. RX-9, p. 43-44.

Mr. Vaughn testified that he has not worked since his employment with Labor Finders. RX-9, p. 36. He testified that he did not apply for any of the jobs recommended by Nancy Favoloro, because he did not have transportation. RX-9, p. 36-37. He did not register with the state employment service. RX-9, p. 38. He testified that he did not feel capable of any form of work due to his condition. RX-9, p. 38. He explained that his left leg gives out and his back hurts. RX-9, p. 39. Mr. Vaughn testified that he did not understand that the jobs recommended by Ms. Favoloro did not require heavy lifting or continuous standing, and he agreed to work with Ms. Favoloro if she contacted him again. RX-9, p. 39.

Mr. Vaughn testified that he typically walks less than a quarter of a mile per day and sits around the rest of the day. RX-9, p. 44. He testified that his pain has gotten worse since recovering from the surgery. RX-9, p. 53. He has pain down his left leg, burning and tingling in the bottom of his left foot, and burning and tingling is beginning in his right foot. RX-9, p. 53-54.

Gail Huguley

Gail Huguley is Mr. Vaughn's sister, and Mr. Vaughn lived with her in Mobile, Alabama, prior to his injury. TR 24. Ms. Huguley testified that she typically drove him to his doctor's appointments and cared for him after the surgery. TR 27. As she recalled, the back surgery helped Mr. Vaughn initially, but he began experiencing pain again after a few months, which progressively worsened. TR 27. She testified that his pain persisted for years up until the time of his death. TR 28.

Ms. Huguley stated that she was present during Mr. Vaughn's visits to Dr. Boltz where he received epidural shots. TR 30. She testified that Mr. Vaughn usually experienced relief for a few days, and on the fourth day the pain would slowly start coming back. TR 31.

Ms. Huguley testified that Mr. Vaughn drank alcohol both before and after his injury, but he drank more when he wasn't able to get any pain medications. TR 32. Ms. Huguley admitted that Mr. Vaughn sometimes drank a twelve-pack of beer in one day. TR 37. She admitted one occasion when Dr. Boltz told Mr. Vaughn that she would not give him injections because she smelled alcohol on him. TR 39. She recalled another occasion when Dr. Boltz did not give Mr. Vaughn an injection because his blood pressure was high. TR 31. She testified that Dr. Boltz told Mr. Vaughn that his high blood pressure was not related to his back injury and he should get treatment from a personal physician. TR 38.

Ms. Huguley testified that approximately one year before his death, Mr. Vaughn began spending the majority of his time in Winfield, rather than Mobile. TR 33. She testified that any time he visited her in Mobile, she had to have someone drive him there. TR 34. She was aware that he began receiving medical care in Tuscaloosa and had been diagnosed with osteonecrosis of both hips. TR 34. She testified that he underwent a hip surgery prior to his death. TR 35.

She testified that Mr. Vaughn had difficulty getting around and lay down several times during the day. He had trouble sleeping, and he complained of constant pain. TR 36.

II. MEDICAL EVIDENCE: Records

Todd K. Volkman, M.D.

Mr. Vaughn was referred to Dr. Volkman, an orthopedist, by Dr. Becker. Dr. Volkman first saw Mr. Vaughn on December 29, 1999, at which time, Mr. Vaughn complained of back pain and pain down his left leg. RX-2, p. 7. On February 4, 2000, Dr. Volkman analyzed an MRI that showed degenerative changes at L5-S1 and possible nerve root impingement at L4-5. He recommended continuing with conservative care and administered an epidural steroid injection. RX-2, p. 5. Mr. Vaughn received a second steroid injection on February 16, 2000. Dr. Volkman noted that the sagittal view of the MRI showed significant disc herniations at L4-5 and L5-S1. RX-2, p. 4. On March 9, 2000, Mr. Vaughn had a nerve root block and epidural. Dr. Volkman noted that Mr. Vaughn experienced pain relief for three to four days. He ordered another nerve root block without epidural. RX-2, p. 1.

Eugene Quindlen, M.D.

Mr. Vaughn was referred to Dr. Quindlen, neurosurgeon, by Dr. Volkman. He first saw Mr. Vaughn on April 5, 2000. Dr. Quindlen recorded that Mr. Vaughn had undergone three epidurals and two nerve root blocks. His impression was that Mr. Vaughn had a left herniation at L4-5 with left SI radiculopathy. He suggested a lumbar

laminectomy. RX-3, p. 9. Dr. Quindlen performed the surgery on April 13, 2000. RX-3, p. 8. The operative report documents that a rupture in the disc annulus was identified; however, even a narrow disc rongeur could not be placed in the space, because the disk space was so collapsed. RX-3, p. 7. Otherwise, the surgery produced no complications. RX-3, p. 8. Mr. Vaughn saw Dr. Quindlen at follow-up visits, where Dr. Quindlen noted that he experienced leg pain only occasionally and that he experienced some back discomfort when walking. RX-3, p. 4-5. On July 24, 2000, Dr. Quindlen placed Mr. Vaughn at MMI, with five percent permanent partial disability rating. He gave permanent restrictions of twenty-five pound lifting maximum, no repetitive bending, stooping, crawling, or climbing, and no vertical loading pressure. RX-3, p. 3. Dr. Quindlen next saw Mr. Vaughn on October 29, 2001, approximately one and half years after the surgery. He noted that Mr. Vaughn had back stiffness and burning pain in the sole of his left foot. He recommended that Mr. Vaughn see his primary care physician to investigate the vascular status of his lower extremities. RX-3, p. 2.

In a letter dated December 20, 2001, Dr. Quindlen wrote to Carrier's representative, Mr. Quick, that Mr. Vaughn had mild to moderate peripheral vascular disease in both lower extremities. He advised that it was not work related, the etiology was artherosclerosis, and Mr. Vaughn should see a primary care physician. Dr. Quindlen also wrote that Mr. Vaughn has peripheral neuropathy, which is related to the peripheral vascular disease and is also treatable by a primary care physician. He stated that Mr. Vaughn had no need for further neurosurgical treatment. However, he recommended a pain specialist, Dr. Boltz, if Mr. Vaughn wished to see her. RX-3, p. 1.

Patricia Boltz, M.D.

Dr. Boltz began treating Mr. Vaughn on February 25, 2002. He complained of insomnia and pain in his legs while walking. Dr. Boltz noted that she smelled alcohol on his breath. She prescribed Skelaxin and Neurontin. RX-4, p. 6. On March 26, 2002, Mr. Vaughn reported that the Skelaxin and Neurontin did not help and the he experienced back pain radiating down his left leg. Dr. Boltz noted that peripheral vascular disease and peripheral neuropathy could be contributing to his leg pain. She ordered epidural steroid injections for pain relief, and remarked that if he did not experience pain relief, he should see a vascular surgeon. RX-4, p. 4. She again noted alcohol on Mr. Vaughn's breath. RX-4, p. 3. She administered an epidural on April 2, 2002. RX-4, p. 2. On May 7, 2002, he was experiencing low back and left leg pain, and he had began experiencing tingling in his right foot. Dr. Boltz could not administer the epidural because Mr. Vaughn's blood pressure was too high. She advised him to see a primary care physician. RX-4, p. 1.

David R. Hassell, M.D.

An MRI was conducted on May 21, 2002. It showed mild narrowing of the L4-5 disc space and marked narrowing of the L5-S1 disc space. The impression was degenerative disc disease at L4-5 and L5-S1, which was more pronounced at L5-S1. CX-15.

Robert L. Ross, III, M.D.

On June 7, 2002, Dr. Ross of the Occupational Health Network reviewed Mr. Vaughn's medical records and opined that neither his high blood pressure nor his peripheral vascular disease were work-related. RX-5.

Wesley L. Spruill, M.D.

When Mr. Vaughn moved to Winfield, Alabama to care for his father, he began receiving medical care in Tuscaloosa, Alabama. Dr. Spruill is a pain specialist, and he first saw Mr. Vaughn on January 23, 2003. Mr. Vaughn complained of low back pain radiating into his right hip and right groin and left anterolateral leg pain. Mr. Vaughn reported that the pain in his right hip and groin had developed in the previous few weeks. Mr. Vaughn rated his pain as ten out of ten that day. RX-6, p. 6. Dr. Spruill ordered an MRI to rule out disc herniation or neural impingement that would be causing the weakness in his legs. CX-11, p. 32. Dr. Spruill also advised Mr. Vaughn to obtain a primary care physician. CX-11, p. 32. The MRI was conducted on January 30, 2003. The MRI revealed bulging and degenerative disc narrowing at L4-5 and L5-S1. CX-11, p. 3-5. The hip MRI revealed osteonecrosis in both hips. CX-11, p. 3. The MRI of the lumbar spine showed mild degenerative disc narrowing at L4-5 with moderate narrowing of L5-S1 and mild disc bulging at L4-5 with no definite neural impingement. CX-11, p. 46.

Gary Keogh, M.D.

Mr. Vaughn began seeing Dr. Keogh on February 19, 2003. He complained of aching pain in the low back with sharp intermittent radiation into the lower extremities and insomnia. RX-6, p. 4. Dr. Keogh assessed that Mr. Vaughn had bilateral hip osteonecrosis, the right hip being more severe than the left, and low back pain associated with degenerative disc disease. RX-6, p. 5. Dr. Keogh referred Mr. Vaughn to an orthopedic surgeon for assessment of his hip, because he "[felt] this [was] a separate problem." He stated, "there is no normal relationship between the bilateral osteonecrosis and the previous history of injury to the low back." RX-6, p. 5. He remarked that he would not change work restrictions until the hip problems were addressed. RX-6, p. 5. Dr. Keogh prescribed Bextra and Elavil. RX-7, p. 27. On April 8, 2003, he administered

an epidural injection. RX-7, p. 28. On June 24, 2003, Dr. Keogh administered another caudal epidural injection under fluoro, and he referred Mr. Vaughn to an orthopedic surgeon for evaluation of his osteonecrosis. RX-7, p. 15. On October 3, 2003, Dr. Keogh noted that Mr. Vaughn had seen an orthopedic surgeon, who had recommended arthroplasty. Dr. Keogh administered another caudal epidural injection and did not use steroids. RX-7, p. 12. On February 9, 2004, Dr. Keogh noted no change in Mr. Vaughn's lower back pain and was unable to administer a caudal epidural injection. RX-7, p. 3.

On March 28, 2003, Dr. Keogh completed a Physical Capacities Evaluation of Mr. Vaughn, stating that he found him "completely unable to work due to severe osteonecrosis of the hips." CX-5, p. 1. Dr. Keogh also completed a Clinical Assessment of Pain where he opined that Mr. Vaughn's pain was of such an extent that it was distracting to his adequate performance of daily activities or work. He also opined that walking, standing, bending and stooping would produce pain such that he would abandon his task. He stated that Mr. Vaughn's medication did not create serious side effects relevant to work activity. He lastly opined that Mr. Vaughn's pain was consistent with his underlying medical condition. CX-5, p. 2-3.

Frederick N. Meyer, M.D.

Dr. Meyer is the Chairman of the Department of Orthopaedic Surgery at the University of South Alabama. After reviewing Mr. Vaughn's medical records, he stated, in a letter dated January 5, 2004, that Mr. Vaughn had undergone at least three epidural steroid injections and two peripheral nerve blocks, which required steroids. He opined that, "it is extremely possible that the steroid was a contributing factor to his developing osteonecrosis of the hips, which was diagnosed in January of 2003." He also added that Mr. Vaughn began complaining of bilateral leg pain in March 2002. CX-3.

III. VOCATIONAL EVIDENCE

Nancy Favaloro

Ms. Favaloro is a certified rehabilitation counselor. She met with Mr. Vaughn on September 1, 2000, and made a subsequent vocational analysis based upon achievement testing, work history and medical history. In a letter dated October 3, 2000, Ms. Favaloro identified several jobs suitable for Mr. Vaughn. She based her search upon Dr. Quindlen's restrictions of a twenty-five pound lifting maximum, no repeated bending, stooping, crawling, or climbing, and no driving of heavy equipment over uneven ground. She identified the following jobs: a sales associate position at Circuit City, a mutual teller position at Mobile Greyhound Park, an unarmed security guard position at Nyco Security, a parking lot cashier at Allright Parking, and an optician position at Wal Mart. RX-8, p. 16. Ms. Favaloro sent Mr. Vaughn a letter listing these jobs, instructing him to apply for

them, and asking him to contact her regarding his job search activities. Mr. Vaughn contacted Ms. Favaloro on October 25, 2002 and told her he had transportation problems that prevented him for applying for the jobs. RX-8, p. 12. On November 8, 2002, Ms. Favaloro contacted Mr. Vaughn, who told her that he had still not applied for any jobs because he had a "riding situation." RX-8, p. 13.

In a report dated November 13, 2000, Ms. Favaloro listed the specific requirements for each job in Coden, Alabama. RX-8, p. 10. The mutual teller position at Mobile Greyhound Park involved collecting and distributing money for bets. A high school diploma was preferred, but not required. The worker could alternate sitting, standing, and walking, and lifting was less than two pounds. The wage was $7.00 per hour. The sales associate position at Circuit City required the worker to stand/walk while working, breaks were provided, and lifting was up to twenty pounds. A high school diploma or GED was preferred, but not required. The wage was $7.25 per hour during training, then $7.73 per hour plus commission after training. The unarmed security guard position had varying duties dependent upon the job site, but all allowed the worker to alternate sitting, standing and walking while working and no heavy lifting was required. Entry wages ranged from $5.30 to $8.00 per hour. Some posts required a high school diploma, while others did not. The parking lot cashier position allowed the worker to sit or stand in a booth; the worker may be required to reach frequently to collect tickets and payment. The lifting maximum was twenty pounds. A high school diploma was not required. The entry level wage was $5.15 per hour. The optician position at Wal Mart involved helping patients select glasses and instructing patients on how to handle contact lenses. The worker would alternate sitting, standing, and walking throughout the day and the lifting maximum was ten pounds. A high school diploma or GED was preferred, but not required. The entry wage was $6.25 per hour. RX-8, p. 11-12. On November 15, 2000, Dr. Quindlen approved all of these jobs. RX-8, p. 7-8.

James N. Cowart

Mr. Cowart is a vocational rehabilitation counselor. He interviewed Mr. Vaughn for approximately one hour on March 24, 2004. CX-2, p. 2. He reviewed his medical records and rendered a Vocational Disability Report on June 16, 2004. CX-2. The report concluded that based on Dr. Keogh's restrictions, Mr. Vaughn was not capable of gainful employment. Based on Dr. Quindlen's restrictions, Mr. Cowart opined that there was suitable work available for Mr. Vaughn in both Mobile County and Marion County. TR 51, 63. He also concluded that based on the restrictions of Dr. Quindlen, Mr. Vaughn could earn approximately $240.00 per week. CX-2, p. 6. Mr. Cowart testified that to his knowledge, the restrictions given by Dr. Quindlen did not take into account the worsening of Mr. Vaughn's condition. TR 53. Mr. Cowart testified that from his experience of reading and being present at Dr. Quindlen's depositions, Dr. Quindlen's restrictions are based on physical limitations necessary to prevent re-injury, rather than the amount of pain that may cause an individual to stop a task. TR 46.

IV. OTHER EVIDENCE

Surveillance Video

Employer submitted a surveillance video filmed on February 6 and February 7, 2002. The video showed Mr. Vaughn being transported to convenience stores and purchasing a twelve-pack of beer on at least one occasion. Mr. Vaughn appeared to walk with no significant limitation. RX-10.

Internet Articles

Claimant submitted an internet article from the Department of Health and Human Services, including answers to frequently asked questions about osteonecrosis. The article discussed that long-term, systemic corticosteroid use is associated with thirty-five percent of all cases of nontraumatic osteonecrosis. It also stated that some studies suggest that corticosteroid-related osteonecrosis is more severe and more likely to affect both hips than osteonecrosis resulting from other causes. Excessive alcohol use is another cause of osteonecrosis. CX-12.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact and conclusions of law are based upon the Court's observations of the credibility of the witnesses, and upon an analysis of the medical records, applicable regulations, statutes, case law, and arguments of the parties. As the trier of fact, this Court may accept or reject all or any part of the evidence, including that of expert medical witnesses, and rely on its own judgment to resolve factual disputes and conflicts in the evidence. See Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962). In evaluating the evidence and reaching a decision, this Court applies the principle, enunciated in Director, OWCP v. Greenwich Collieries, 114 S.Ct. 2251 (1994), that the burden of persuasion is with the proponent of the rule. The "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, will not be applied, because it violates § 556(d) of the Administrative Procedure Act. See Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 281, 114 S.Ct. 2251, 2259, 129 L.Ed. 2d 221 (1994).

JURISDICTION AND COVERAGE

This dispute is before the Court pursuant to 33 U.S.C. §919(d) and 5 U.S.C. §554, by way of 20 C.F.R. §§ 702.331 and 702.332. See Main v. Brady-Hamilton Stevedore Co., 18 BRBS 129, 131 (1986).

In order to demonstrate coverage under the Longshore and Harbor Workers' Compensation Act, a worker must satisfy both a situs and a status test. Herb's Welding, Inc. v. Gray, 470 U.S. 414, 415-16, 105 S.Ct. 1421, 1423, 84 L.Ed. 2d 406 (1985); P.C. Pfeiffer Co. v. Ford, 444 U.S. 69, 73, 100 S.Ct. 328, 332, 62 L.Ed. 2d 225 (1979). The situs test limits the geographic coverage of the LHWCA, while the status test is an occupational concept that focuses on the nature of the worker's activities. Bienvenu v. Texaco, Inc., 164 F.3d 901, 904 (5th Cir. 1999); P.C. Pfeiffer Co., 444 U.S. at 78, 100 S.Ct. at 334-35, 62 L.Ed.2d 225.

The situs test originates from §3(a) of the LHWCA, 33 U.S.C. § 903(a), and the status test originates from §2(3), 33 U.S.C. § 902(3). See P.C. Pfeiffer Co., 444 U.S. at 73-74, 100 S.Ct. at 332, 62 L.Ed. 2d 225. With respect to the situs requirement, § 3(a) states that the LHWCA provides compensation for a worker whose "disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel)." Id. With respect to the status requirement, § 2(3) defines an "employee" as "any person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and shipbreaker . . . ." Id. To be eligible for compensation, a person must be an employee as defined by § 2(3) who sustains an injury on the situs defined by § 3(a). Id.

In this case, the parties do not contest jurisdiction under the Act. At the time of injury, Claimant was employed operating a bulldozer to load wood chips inside of a vessel located on the navigable waters of the United States. JX-1. Therefore, the Court finds that jurisdiction under the Act is proper for this case.

FACT OF INJURY AND CAUSATION

The claimant has the burden of establishing a *prima facie* case of compensability. He must demonstrate that he sustained a physical and/or mental harm and prove that working conditions existed, or an accident occurred, which could have caused the harm. Graham v. Newport News Shipbuilding & Dry Dock Co., 13 BRBS 336, 338 (1981); U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP, 455 U.S. 608, 616, 102 S.Ct. 1312, 1318, 71 L.Ed. 2d 495 (1982). Once the claimant establishes these two elements of his *prima facie* case, § 20(a) of the Act provides him with a presumption that links the harm suffered with the claimant's employment. See Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981); Hampton v. Bethlehem Steel Corp., 24 BRBS 141, 143 (1990). When an employee sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside of work, the employer is liable for the entire disability and for medical expenses during both injuries if the subsequent injury is the natural and unavoidable result of the original work injury. See Atlantic

Marine v. Bruce, 661 F.2d 898, 901, 14 BRBS 63,65 (5th Cir. 1981); Cyr v. Crescent Wharf & Warehouse Co., 211 F.2d 454, 456-57 (9th Cir. 1954); Mijangos v. Avondale Shipyards, 19 BRBS 15, 17 (1986). In addition, if a claimant's employment aggravates a non-work-related, underlying disease or condition so as to produce incapacitating symptoms, the resulting disability is compensable. See Gardner v. Bath Iron Works Corp., 11 BRBS 556 (1979), aff'd sub nom. Gardner v. Director, OWCP, 640 F.2d 1385, 13 BRBS 101 (1st cir. 1981).

In this case, the parties have stipulated that Claimant had a work-related accident on December 15, 1999. See JX-1. Claimant testified that he suffered injury to his back when he was thrown against a steel beam while removing a cage cover from a motor. RX-9, p. 16-19. The parties do not dispute causation of Claimant's original back injury. However, they dispute causation of his later-diagnosed hip osteonecrosis. CX-11, p. 3. Claimant argues that his hip condition is part of his work injury because it was caused or aggravated by the steroid treatments he received for his back injury. Employer argues that the hip condition is a separate, non-related injury and that it could have been caused by Claimant's excessive alcohol consumption.

Initially, the Court finds that Claimant has presented evidence sufficient to make a *prima facie* case of compensability regarding hip osteonecrosis. His medical records establish that he was diagnosed with hip osteonecrosis by Dr. Spruill in January 2003. CX-11, p. 3. Claimant offers the expert opinion of Dr. Meyer, Chairman of the Department of Orthopaedic Surgery at the University of South Alabama, to establish that the steroid treatments he received as a result of his back injury could have caused the hip osteonecrosis. CX-3. Dr. Meyer opined that it was "extremely possible that the steroid was a contributing factor to the developing hip osteonecrosis." CX-3. Claimant also submits an internet article from the Department of Health and Human Services, which discusses that long-term, systemic corticosteroid use, is associated with hip osteonecrosis. CX-12. Claimant has established that he suffered the physical harm of hip osteonecrosis and that his work injury required steroid treatments that could have caused the hip condition. Accordingly, Claimant has made a *prima facie* case of compensability and is entitled to the § 20(a) presumption.

After the § 20(a) presumption has been established, the employer must introduce "substantial evidence" to rebut the presumption of compensability and show that the claim is not one "arising out of or in the course of employment." 33 U.S.C. §§ 902(2), 903. Only after the employer offers substantial evidence does the presumption disappear. Del Vecchio v. Bowers, 296 U.S. 280, 286, 56 S.Ct. 190, 193 (1935). Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept to support a conclusion. Sprague v. Director, OWCP, 688 F.2d 862, 865 (1st Cir. 1982). If

the employer meets its burden, the presumption disappears, and the issue of causation must be resolved based upon the evidence as a whole. Kier v. Bethlehem Steel Corp. 16 BRBS 128, 129 (1984); Devine v. Atlantic Container Lines, G.I.E., 25 BRBS 15, 21 (1991).

To rebut the §20(a) presumption, Employer argues that Claimant's hip osteonecrosis did not arise out of his employment injury, because none of his treating physicians related the hip condition to the prior injury. Claimant was originally diagnosed with hip osteonecrosis as a result of an MRI conducted in January 2003. CX-11, p. 3. Dr. Keogh, a pain specialist who began treating Claimant for his back injury in February 2003, referred him to an orthopedic surgeon for assessment of his hip, stating, "There is no normal relationship between the bilateral osteonecrosis and the previous history of injury to the low back." RX-6, p. 5. Employer asserts that because none of Claimant's treating physicians related his hip condition to his back injury, there is substantial evidence that his hip injury did not arise out of his employment injury. Employer additionally argues that Claimant's excessive alcohol consumption could have caused hip osteonecrosis. The internet articles submitted into evidence state that excessive alcohol use can be a cause of osteonecrosis. CX-12. Claimant's sister, Ms. Huguley, testified that Claimant drank alcohol both before and after his work injury, and sometimes drank a twelve-pack of beer in one day. TR 32, 37. Additionally, Dr. Boltz's records reveal that she smelled alcohol on Claimant's breath on at least two occasions. RX-4, p. 3, 6. The Court finds that the fact that none of Claimant's treating physicians opined that there was a relationship between the hip condition and the back injury and that Dr. Keogh opined that there was no normal relationship between the two conditions is substantial evidence that would cause a reasonable mind to accept the conclusion that Claimant's hip osteonecrosis did not arise out of his employment injury. However, Employer's argument relating Claimant's alcohol use to his hip condition is speculative and is not supported by substantial evidence. Nevertheless, the Court finds that Employer has rebutted the §20(a) presumption.

Because Employer has rebutted the § 20(a) presumption, the issue of causation of Claimant's bilateral hip osteonecrosis must be resolved based on the evidence as a whole. Kier v. Bethlehem Steel Corp. 16 BRBS 128, 129 (1984); Devine v. Atlantic Container Lines, G.I.E., 25 BRBS 15, 21 (1991). The only medical opinion submitted by Claimant to support a causal connection is the brief letter from Dr. Meyer, rendered after a review of Claimant's medical records, stating that it is "extremely possible" that steroids contributed to Claimant's development of osteonecrosis. CX-3. The Court finds this statement equivocal and too tenuous on which to base a finding of causation. While the internet articles support the conjecture that Claimant's steroid exposure could have contributed to his hip osteonecrosis, their statistics and discussion of the relationship do not amount to an opinion of reasonable medical certainty that Claimant's case of hip osteonecrosis is, in fact, related to his steroid treatments. Claimant's evidence as a whole falls short of convincing the Court that in Claimant's specific instance, his bilateral hip

osteonecrosis was caused by steroid injections. Claimant argues that Dr. Keogh's opinion of no normal or identifiable relationship is not definitive because it does not address whether epidural steroids contributed to his development of Claimant's osteonecrosis. However, even without Dr. Keogh's opinion, the Court is left with no opinion from an appropriate treating physician regarding the causation of Claimant's hip condition. Dr. Keogh's records reflect that Claimant saw an orthopedic surgeon regarding his hip condition; yet, the record contains no opinion from this physician. In this instance, the lack of evidence weighs against Claimant, the Court does not possess any concrete evidence upon which to base a finding of causation. Therefore, based on the evidence as a whole, the Court finds that Claimant's hip osteonecrosis was not a result of his employment-related injury.[3]

NATURE AND EXTENT OF SCHEDULED DISABILITY

Disability under the Act means, "Incapacity as a result of injury to earn wages which the employee was receiving at the time of injury at the same or any other employment." 33 U.S.C. § 902(10). Therefore, in order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Under this standard, an employee will be found to have no loss of wage earning capacity, a total loss, or a partial loss. The burden of proving the nature and extent of disability rests with the claimant. Trask v. Lockheed Shipbuilding Constr. Co., 17 BRBS 56, 59 (1980).

The nature of a disability can be either permanent or temporary. A disability classified as permanent is one that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. SGS Control Servs. v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, 17 BRBS at 60. Any disability suffered by the claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metro. Area Transit Auth., 16 BRBS 231 (1984); SGS Control Servs., 86 F.3d at 443.

The date of maximum medical improvement is the traditional method of determining whether a disability is permanent or temporary in nature. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235 n.5, (1985); Trask, 17 BRBS at 60; Stevens v. Lockheed Shipbuilding Co., 22 BRBS 155, 157 (1989). The date of maximum medical improvement is the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. This date is

[3] Employer's argument that Claimant's excessive alcohol consumption could have caused his hip condition creates only another possible cause of the condition and is not determinative of causation.

primarily a medical determination. Manson v. Bender Welding & Mach. Co., 16 BRBS 307, 309 (1984). It is also a question of fact that is based upon the medical evidence of record, regardless of economic or vocational consideration. Louisiana Ins. Guar. Ass'n. v. Abbott, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994); Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamic Corp., 10 BRBS 915 (1979).

Dr. Quindlen placed Claimant at MMI for his back injury on July 24, 2000 and gave him a five percent permanent partial disability rating. RX-3, p. 3. The Court accepts the date given by Dr. Quindlen, as he was Claimant's treating neurosurgeon for his back injury. Therefore, Claimant's back injury became permanent on July 24, 2000.[4]

The extent of disability can be either partial or total. To establish a *prima facie* case of total disability, the claimant must show that he cannot return to his regular or usual employment due to his work related injury. See Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989); Harrison v. Todd Pac. Shipyards Corp., 21 BRBS 339 (1988). Total disability becomes partial on the earliest date that the employer establishes suitable alternative employment. Rinaldi v. General Shipbuilding Co., 25 BRBS 128 (1991). To establish suitable alternative employment, an employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. New Orleans Stevedores v. Turner, 661 F.2d 1031 (5th Cir. 1981); McCabe v. Sun Shipbuilding & Dry Dock Co., 602 F.2d 59 (3d Cir. 1979). For the job opportunities to be realistic, however, the employer must establish their precise nature, terms, and availability. Thompson v. Lockheed Shipbuilding & Constr. Co., 21 BRBS 94, 97 (1988). A failure to prove suitable alternative employment results in a finding of total disability. Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989). If the employer meets its burden and shows suitable alternative employment, the burden shifts back to the claimant to prove a diligent search and willingness to work. See Williams v. Halter Marine Serv., 19 BRBS 248 (1987). If the employee does not prove this, then at the most, his disability is partial and not total. See 33 U.S.C. § 908(c); Southern v. Farmers Export Co., 17 BRBS 64 (1985).

On July 24, 2000, Dr. Quindlen issued permanent restrictions of twenty-five pounds maximum lifting, no repetitive bending, stooping, crawling, or climbing, and no vertical loading pressure. He also restricted Claimant from driving heavy equipment over uneven ground, including driving a bulldozer. RX-3, p. 3. Claimant's usual employment

[4] The parties neither stipulated a date of maximum medical improvement nor argued the issue in the post-hearing briefs.

involved operating a bulldozer inside of a vessel. RX-9, p. 16. Pursuant to Dr. Quindlen's restrictions, Claimant was specifically prohibited from driving a bulldozer, and, hence, he was unable to return to his usual employment. Therefore, the Court finds that Claimant has established a *prima facie* case of total disability.

However, the Court finds that Employer demonstrated suitable alternative employment in Nancy Favaloro's November 13, 2000 report. In this report, Ms. Favoloro identified five potential employment opportunities in the Coden, Alabama area based on Claimant's age, education, training and experience, and physical capabilities. The positions included a mutual teller position at Mobile Greyhound Park, paying $7.00 per hour, a sales associate position at Circuit City, paying $7.25 per hour during training, then $7.73 per hour plus commission after training, an unarmed security guard position, paying from $5.30 to $8.00 per hour, a parking lot cashier position, paying $5.15 per hour, and an optician position at Wal Mart, paying $6.25 per hour. RX-8, p. 11-12. Each employment opportunity in the report complied with Dr. Quindlen's restrictions, and Dr. Quindlen approved all of these jobs on November 15, 2000. RX-8, p. 7-8.

Claimant argues that Dr. Quindlen's restrictions are not determinative of his physical capabilities because they do not take into account that his back condition increasingly deteriorated following his initial improvement after the surgery. He further argues that Dr. Quindlen's restrictions do not consider pain as a factor and asserts that his pain was severe enough to be referred to Dr. Boltz for pain management. Claimant's arguments do not persuade the Court that Dr. Quindlen's restrictions were an inadequate reflection of his physical limitations arising our of his back injury. Claimant did not see any physician from July 24, 2000, the date Dr. Quindlen issued the restrictions, through October 29, 2001. Therefore, the record contains no evidence of Claimant's physical deterioration during this time period. When Claimant returned to Dr. Quindlen on October 29, 2001, Dr. Quindlen did not alter his restrictions. RX-3, p. 2. Even if Dr. Quindlen's restrictions did not consider pain, Claimant's pain specialist, Dr. Boltz, did not alter Dr. Quindlen's original restriction when Claimant began seeing her years later. Dr. Boltz diagnosed Claimant with peripheral vascular disease and peripheral neuropathy, which was possibly contributing to his pain. RX-4, p. 4. Dr. Quindlen had also diagnosed these problems in December 2001, stating they were not work-related. RX-3, p. 1. Therefore, at this point in time, Claimant had a non-work related condition that was possibly contributing to his pain. Additionally, Mr. Cowart's testimony that Dr. Quindlen's restrictions typically do not account for the patient's pain is not an evidentiary basis for this Court to read beyond the restrictions given. The Court finds Dr. Quindlen's restrictions to be an accurate description of Claimant's physical capabilities as a result of his work injury. Dr. Keogh's statement that Claimant was "completely unable to work *due to severe osteonecrosis of the hips*" does not apply to his physical limitations for

purposes of this case, as the Court has already found that Claimant's hip condition is not related to his work injury. CX-5, p.1. In conclusion, the Court finds Dr. Quindlen's restrictions to be a suitable basis on which to base Claimant's physical capabilities for the purpose of establishing suitable alternative employment.

The Court finds that Claimant did not prove that he was diligent in his job search efforts. At his deposition, Claimant testified that he has not worked since his employment injury and that he did not apply for any of the jobs recommended by Nancy Favaloro. RX-9, p. 36-37. Because Employer established suitable alternative employment on November 13, 2000, and Claimant failed to meet the burden of proving a diligent search and willingness to work at that time, the Court finds that Claimant's entitlement to total disability benefits ceased on November 13, 2000. The Court finds that as of November 13, 2000, Claimant is entitled only to partial disability.

Accordingly, the Court finds that Claimant was temporarily totally disabled from December 18, 1999 through July 23, 2000 and permanently totally disabled from July 24, 2000 through November 12, 2000. Claimant was permanently partially disabled on November 13, 2000 and continuing through his date of death.

WAGE-EARNING CAPACITY

The determination of post-injury wage-earning capacity in cases of permanent partial disability is governed by §§ 8(c) and 8(h) of the Act, 33 U.S.C. §§ 908(c) and 908(h). La Faille v. Benefits Review BD., 884 F.2d 54, 60, 22 BRBS 108, 118 (CRT)(2nd Cir. 1989). Because Claimant's injury is not of a kind specifically identified in the schedule set forth in §§ 8(c)(1)-(20), it falls under § 8(c)(21). 33 U.S.C. §§ 908(c)(1)-(21). Under § 8(c)(21), compensation is set at 66 2/3 percent of the difference between claimant's average weekly wages at the time of the injury and his post-injury wage-earning capacity, as determined pursuant to § 8(h) of the Act. Bethard v. Sun Shipbuilding & Dry Dock Co., 12 BRBS 691, 693 (1980); 33 U.S.C. § 908(c)(21).

Section 8(h) provides in part that post-injury wage-earning capacity shall be determined by claimant's actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity. Bethard, 12 BRBS at 693; 33 U.S.C. § 908(h). However, if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the Court may, in the interest of justice, fix such wage earning capacity as shall be reasonable, having due regard to the nature of the employee's injury, the degree of physical impairment, the employee's usual employment, and any other factors or circumstances which may affect the employee's capacity to earn wages in a disabled condition, including the effect of disability as it may naturally extend into the future. 33 U.S.C. § 908(h). Furthermore, §§ 8(c)21 and 8(h) of the Act require that the wages earned in a post injury job be adjusted to account for inflation in order to represent the wages that job paid at the time of the claimant's injury,

insuring that wage-earning capacity is considered on an equal footing with the determination under § 10 of average weekly wage at the time of the injury. Richardson v. General Dynamics Corp., 19 BRBS 48, 49-50 (1986); Bethard, 12 BRBS at 695; La Faille, 884 F.2d at 61, 22 BRBS at 120. The Benefits Review Board has held that the percentage increase in the National Average Weekly Wage ("NAWW") for each year should be used to adjust a claimant's post-injury wages for inflation. Richardson v. General Dynamics Corp., 23 BRBS 327, 330-31 (1990). In addition, a court may average the hourly wages of jobs found to be suitable alternative employment in order to calculate wage-earning capacity. Avondale Industries v. Pulliam, 137 F.3d 326, 328, 32 BRBS 65, 67 (5th Cir. 1998).

In the present case, Employer showed five suitable employment opportunities for Claimant. The hourly wages of these positions averaged $6.19 per hour.[5] This equates to a weekly wage of $247.60 for a forty-hour work week. Therefore, the Court finds that the proper wage-earning capacity for Claimant on November 13, 2000, the date suitable alternative employment was established, is $247.60 per week. This November 2000 weekly wage must be adjusted downward to account for inflation since the time of Claimant's work-related injury. The NAWW for November 2000 is $466.91, and the NAWW for December 1999 is $450.64. United States Dept. of Labor, Employment Standards Administration (August 9, 2005). Adjusting the November 2000 average weekly wage of $247.60 in consideration of the December 1999 NAWW, the Court finds that the proper wage-earning capacity for Claimant in December 1999 with respect to these positions is $238.97 per week.[6] Therefore, the Court finds that the proper wage-earning capacity for Claimant in December 1999 wages is $238.97 per week.

ATTORNEY'S FEES

Under Section 28(b) of the Act, when an employer voluntarily pays benefits and thereafter a controversy arises over additional compensation due, the employer will be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that paid by the employer. See 33 U.S.C. § 928(b); Moody v. Ingalls Shipbuilding, Inc., 27 BRBS 173, 176 (1993). In awarding a fee, the administrative law judge must take into account the quality of the representation, the complexity of the legal issues involved, and the amount of benefits awarded. 20 C.F.R. § 702.132; Muscella v. Sun Shipbuilding & Dry Dock Co., 12 BRBS 272 (1980).

Employer paid Claimant temporary total disability benefits from December 18, 1999 through November 24, 2000, for forty-nine weeks, at a rate of $271.29 per week, for a total of $13,293.21. See JX-1. The rate of $271.20 per week was based on an

[5] The Court arrived at this figure by averaging the entry level wage of the positions as follows: ($7.00 + $7.25 + $5.30 + $5.15 + $6.25)/5 = $6.19.

[6] The Court arrived at these figures by calculating the proportion: *x*/ $450.64= $247.60 /$466.91.

average weekly wage of $406.93. This Court has awarded Claimant temporary total disability from December 18, 1999 through July 23, 2000 and permanent total disability from July 24, 2000 through November 12, 2000, based on an average weekly wage of $406.93. Claimant was awarded permanent partial disability from November 13, 2000 through his date of death, based on an average weekly wage of $406.93, to be reduced by a residual wage-earning capacity of $238.97 per week. Claimant has succeeded in obtaining compensation beyond November 24, 2000, the last date Employer paid benefits to Claimant. Therefore, the Court finds that Employer is liable for Claimant's reasonable attorney's fees.

Accordingly,

ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

1) Employer shall pay to Claimant compensation for temporary total disability from December 18, 1999 through July 23, 2000, based on an average weekly wage of $406.93.

2) Employer shall pay to Claimant compensation for permanent total disability, based on an average weekly wage of $406.93, commencing on July 24, 2000 through November 12, 2000.

3) Employer shall pay to Claimant compensation for permanent partial disability from November 13, 2000 through his date of death, based on an average weekly wage of $406.93, to be reduced by a residual wage-earning capacity of $238.97 per week.

4) Employer shall be entitled to a credit for all payments of compensation that it previously made to Claimant.

5) Employer shall pay to Claimant interest on any unpaid compensation benefits. The rate shall be calculated as of the date of this Order at the rate provided by 28 U.S.C. Section 1961.

6) Claimant's counsel shall have thirty (30) days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have thirty (30) days from receipt of the fee petition in which to file a response.

7) All calculations necessary for the payment of this award are to be made by the OWCP District Director.

So ORDERED.

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RICHARD D. MILLS
Administrative Law Judge